Supreme Court, U.S.
FILED
JAN 3 2003
OFFICE OF THE CLERK

(10)

No. 02-322

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner,

v.

CITY OF CHICAGO,

BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE, IN SUPPORT OF UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBBACO AND FIREARMS

LARRY H. JAMES (0021773)
Counsel of Record
CHRISTINA L. CORL (0067869)
LAURA MACGREGOR. COMEK (0070959)

CRABBE, BROWN & JAMES, LLP
500 South Front Street, Suite 1200
Columbus, OH 43215
(614) 228-5511
Attorneys for Amicus Curiae
Fraternal Order of Police

Wright Appellate Services 1212
(215) 733-9870 ● (800) 507-9020● Fax (215) 733-9872

12 PM

QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. §552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database); and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption (7)(C), 5 U.S.C. §552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption (7)(A), 5 U.S.C. §552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Introduction 1

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved 2

Statement 3

I. INTRODUCTION 3

A. The National Fraternal Order of Police - More than 303,000 Men and Women of Law Enforcement Urging Reversal of the Decision of the Seventh Circuit Court of Appeals. 3

B. Background. 6

II. LEGAL PRECEDENT AND STANDARD 8

A. Applicable Standard 8

B. Application of *Robbins Tire* 8

C. The "General Showing" Required by *Robbins Tire* Was Met by ATF in this Case 13

D. The Expectation of Confidentiality Among Law Enforcement Agencies 16

E. *NAACP v. Accusport Corp., et al.*, 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.) 20

F. Chilling Effect 21

III. CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, 287 F.3d 628 (7th Cir. 2002) 7

City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, 297 F.3d 672 (7th Cir. 2002) 7

Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 776-80 (1989)..... 8

NAACP v. Accusport Corp., et al., 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.)..... 16, 18, 19, 20

NLRB v. Robbins Tire & Rubber Co.,437 U.S. 214, 236 (1978)..... 8, 9

Statutes and Rule:

Freedom of Information Act, 5 U.S.C. §552 ..... 2, 6, 8

Freedom of Information Act, 5 U.S.C. §552(b)(7)(A) 3, 6, 8

Freedom of Information Act, 5 U.S.C. §552(b)(7)(C)..... 3

*Gun Control Act of 1968,*18 U.S.C. §923(g) 6

Supreme Ct. R. 10(a) .....

Miscellaneous:

Senate Hearing re: FOIA Amendments, 1975 Source Book 349..... 10

S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 10

"The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p. 19..... 5

APPENDIX

Appendix A – Brief of *Amicus Curiae* The Fraternal Order of Police In Support of Rehearing *En Banc*, dated June 7, 2002 ..... 1a

Appendix B – Memorandum of Understanding, City of Chicago Police Department, dated September 18, 2001 ..... 25a

Appendix C – Correspondence of Raymond W. Kelly, City of New York Police Commissioner, dated August 19, 2002 ..... 31a

Appendix D – Affidavit of Pedro J. Perez, New York State Police, Assistant Deputy Superintendent, dated July 10, 2002 ..... 34a

Appendix E – Transcript of Civil Cause for Motion, *NAACP v. Accusport Corp., et al.*, 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.) 42a

Appendix F – Affidavit of Harold Litwin, Chief of Operations, Buffalo Police Department, dated July 3, 2002 ..... 87a

Appendix G – Consent to File per Supreme Ct. R. 37, dated September 26, 2002 ..... 93a

No. 02-322

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner

v.

CITY OF CHICAGO

BRIEF OF AMICUS CURIAE, FRATERNAL ORDER OF POLICE

Now comes the Fraternal Order of Police, on behalf of the more than 303,000 member law enforcement personnel nationwide, by and through undersigned counsel, and hereby respectfully submits its Brief in support of the United States Department of The Treasury, Bureau of Alcohol, Tobacco and Firearms, urging reversal of the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW[1]

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a-18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

This Court granted certiorari on or about November 12, 2002.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are -
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement

1 The submission of this Brief was consented to by the City of Chicago's Corporate Counsel on or about December 1, 2002, (See Appendix G, attached hereto).

The office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

> records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. * * *

5 U.S.C. §552(b)(7)(A) and (C).

STATEMENT

With this Brief, the National Fraternal Order of Police ("FOP") seeks to present the views of its more than 303,000 law enforcement members and the specific impacts to their lives and work that will result from the decision rendered by the Seventh Circuit Court of Appeals. This Brief will focus on FOIA Exemption 5 U.S.C. §552(7)(A) with regard to the interference with law enforcement proceedings, where the FOP position is most strongly embodied. The FOP adopts and incorporates by reference the Statement and Arguments made within the brief filed on behalf of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms, as those arguments relate to the applicability of FOIA Exemption 5 U.S.C. §552(7)(C).

I. INTRODUCTION

A. The National Fraternal Order of Police - More than 303,000 Men and Women of Law Enforcement Urging Reversal of the Decision of the Seventh Circuit Court of Appeals.

The National Fraternal Order of Police represents more than 303,000 law enforcement personnel at every level of

crime prevention and investigation, nationwide and internationally. Significant interference with the work of law enforcement personnel, and a threat to their very lives, is squarely presented in this case. Simply stated, the decision of the Seventh Circuit Court of Appeals and the ordered disclosure of data maintained by ATF will result in jeopardized safety of law enforcement personnel.

The National Fraternal Order of Police was founded in 1915. What was originally contemplated as an organization for the "social welfare of all the police" has evolved into an active representative group working to protect and secure the laws and work of it's law enforcement members. The work of the FOP's law enforcement members has long been understood as a significant task:

> The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. *** The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the state. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that measure which is due to the great importance of the duties he discharges.[2]

There is no one group more qualified to speak to the issues presented than the National FOP. The FOP perspective on this issue is unique, and particularly appropriate to the substantive law enforcement issues raised within this case. Law enforcement personnel nationwide, and at an international level, work every day to promote and ensure the safety of people everywhere. It is America's law enforcement personnel that patrol the streets, protect people and their families, investigate crime, and arrest criminals. As part of these tasks, law enforcement personnel are engaged in many different efforts, including but not limited to investigation, witness interviews, interviews with suspected criminal associates, and review of substantive evidentiary matters. So too, law enforcement personnel may go undercover to investigate and/or infiltrate suspected crime groups. The decision of the Seventh Circuit Court of Appeals to require the disclosure of investigatory information, will thwart each and every law enforcement effort listed above.

It is with these interests in mind that the FOP and its membership respectfully request this honorable Court reverse the decision of the Seventh Circuit Court of Appeals and order such investigatory data be exempt from FOIA disclosure.

---

[2] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p. 19.

B. Background.

As set forth more fully in the brief filed by ATF, this case involves firearms tracing data compiled by ATF from information received by local, state and international law enforcement agencies seeking and providing information regarding ***ongoing criminal investigations.*** This information is electronically compiled and includes information concerning ATF's tracing of weapons used in crimes, as well as witness names, law enforcement names and departments, other suspects and other suspected crimes. This information is utilized by law enforcement agencies, by requests for this information made to ATF. The exchange of and request for tracing data can only be made when an active law enforcement investigation is underway. *Gun Control Act of 1968,* 18 U.S.C. §923(g).

At it's inception, this case involved a request by the City of Chicago to ATF for information included within the firearms trace databases, pursuant to the Freedom of Information Act, 5 U.S.C. §552 for use in the City of Chicago's lawsuit against various gun manufacturers and distributors.

The first decision issued by the Seventh Circuit with regard to the requested exemptions under FOIA, 5 U.S.C. §552(b)(7)(A), was inconsistent with the FOIA statute, the *Robbins,* supra. decision, and the *Reporters Committee,* supra., standards. The decision held:

> ATF concedes that it is not aware of a ***single instance*** in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any ***specific instances*** in which disclosing the type of records requested ***did result*** in interference with any proceedings or investigation. ATF's hypothetic scenarios did not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk. ***ATF could not identify a ***single concrete law enforcement proceeding*** that could be endangered by the release of this information.

City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, 287 F.3d 628 (7th Cir. 2002) (emphasis added).

This determination was an erroneous application of the FOIA exemption standard, and did not reflect an appropriate consideration of the evidence presented below.

Following a Motion for Rehearing *en banc*, the Seventh Circuit Court amended its opinion, to apparently revise the legal standard applied. The Court of Appeals then simply stated the evidence presented was not reasonably calculated to interfere with ongoing law enforcement procedures. *City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 297 F.3d 672 (7th Cir. 2002).

II. LEGAL PRECEDENT AND STANDARD.

A. Applicable Standard.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552 generally mandates disclosure of records held by an agency of the federal government. Within §552(b) are exemptions from this generally compelled disclosure. Included therein is FOIA Exemption §552(b)(7)(A), which permits the withholding of agency records where disclosure "could reasonably be expected to interfere with enforcement proceedings." Applying Exemption §552(b)(7)(A), a federal agency need only demonstrate "disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). In *Robbins Tire,* this Court made clear that an agency is not required to establish that the release of information would interfere with a specific enforcement proceeding. In a subsequent case, this Court adopted a "categorical" approach and rationale to such exemptions, noting that an agency's determination of exemption may be made "without regard to individual circumstances." *See Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 776-80 (1989).

The United States Court of Appeals, Seventh Circuit, has radically departed from that legal standard.

B. Application of *Robbins Tire.*

Rarely are legal issues so clear, either as a result of prior legal precedent or sheer common sense. It seems common sense that requiring ATF to release the names of witnesses and law enforcement officers that are involved in or related

to ongoing law enforcement investigations can reasonably be expected to interfere with these investigation. So too, would disclosure of the law enforcement personnel involved in such ongoing investigations seem to obviously jeopardize the safety of those officers.

In fact, this debate about whether information or data compiled from or for pending investigations is exempt from disclosure has already been held, and in this forum. This Court in *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 236 (1978) explored these same arguments relating to the release of witness information and statements from ongoing proceedings, in the context of NLRB enforcement proceedings. This Court explored and gave significant analysis to the Freedom of Information Act's statutory construction and the legal requirements therein with regard to a showing for exemption. Also reviewed was the overarching principles of the FOIA exemptions of 5 U.S.C. §552(7). That review revealed an expansive and thorough legislative history on the law and its subsequent amendments. From the legislative history and statute itself, the following is clear:

> (1) neither statutory construction nor reference to the legislative intent require specific evidence or a case-specific showing as to how the disclosure of particular information can be reasonably expected to interfere with law enforcement efforts; *Robbins Tire,* supra., at 229;
>
> (2) the FOIA exemptions were intended to specifically "safeguard legitimate investigations by fed-

eral agencies." *Senate Hearing re: FOIA Amendments,* 1975 Source Book 349[3]; and

(3) Congress specifically contemplated that "witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing." *Robbins Tire*, supra., at 225.

A simple reading of *Robbins Tire*, and the analysis contained therein, is directly on point to the fact pattern at issue here. These cases present similar facts involving similar information and with similar interests at stake. Specifically, *Robbins Tire* addressed witness disclosure, witness statement disclosure and investigatory information in the context of an ongoing *NLRB* enforcement proceeding. Here, the City of Chicago seeks similar investigatory data which includes witness name and information, officer name and information, and other data related to ongoing criminal investigations. As was determined in *Robbins Tire*, release of the ATF firearms trace data will very likely result in reluctant witness testimony and potential for other compromised results. In *Robbins Tire,* those compromised results were sufficient "interference" to warrant their exemption from FOIA disclosure. That same rationale requires that the information

---

[3] A 1983 Senate report,"recognize[d] the lack of certainty in attempting to predict harm," which recognition ultimately resulted in the use of an objective standard of reasonableness for application of FOIA Exemption (7)(A). S. Rep. No. 221, 98th Cong., 1st Sess. (1983). See also Dept. of Justice v. Reporters Committee for Freedom of the Press, supra.

sought by the City of Chicago herein be exempt from disclosure pursuant to FOIA Exemption (7)(A).[4]

Why then, with the legal issue so straight forward, must this Court revisit this issue? First, the Seventh Circuit Court of Appeals erred in its application of *Robbins Tire*. This error, not at all undone or corrected by the amended decision, results in the kind of generally foreseeable harm that the drafters of the actual law intended to prevent, that being interference with enforcement proceedings.

This Court must consider the errant Seventh Circuit decision and the practical effects of such disclosure on the participants of such investigations. Obviously, a release of officer name and information jeopardizes the life, safety and work of that officer. Similarly, release of witness information jeopardizes both the investigation and the life of that witness. That conclusion is strongly supported by both the legislative history of the FOIA and the review of that legislative history as discussed in *Robbins Tire*.

Second, the current circumstances of crime detection and prevention in the United States warrant a strong statement in favor of safety, order and support for law enforcement officers. While the initial request for ATF firearms trace data by the City of Chicago pertained to its suit against gun manu-

---

[4] In fact, the Robbins Tire Court actually contemplated that disclosure of such information, including witness statements and other investigatory information will "necessarily" result in interference with law enforcement procedures. See Robbins Tire, supra., at 220, citing Title Guarantee Company v. NLRB, 534 F.2d 484 (2d Circuit, 1996).

facturers, it cannot be gainsaid that the issues presented here do not have potentially infinite application to the current state of affairs and the hundreds, if not thousands, of current investigations being conducted by federal agencies wherein the requested ATF firearms trace data is being utilized.[5]

This Court is again being asked to speak to this issue of national significance, construe Exemption (7)(A), consider the application of that Exemption to this fact pattern and, with the practical effects in mind, draw a bright line for withholding information when it is utilized in ongoing criminal investigations. The identifying of ATF firearms trace data as exempt from FOIA disclosure is the next logical step to protecting law enforcement efforts and lives, while striking a balance between the ultimate interests presented with FOIA disclosures. Considering the interests of open information as balanced against the safety of law enforcement officers, witnesses and possibly mere bystanders involved in ongoing criminal investigations, that line seems clear. This information must be kept exempt from disclosure.

Ultimately, the legal issue in this case is clear. Pursuant to the plain language of FOIA Exemption (7)(A) and this Court's analysis, review and application in *Robbins Tire*, the ATF firearms trace data requested by the City of Chicago is

---

[5] This is not to ignore for even a moment, the hundreds of thousands of law enforcement investigations currently pending at the state and local levels, many of which would also be adversely impacted by the Seventh Circuit decision releasing investigation information.

exempt from FOIA disclosure. The FOP respectfully requests this Court make that determination.

C. The "General Showing" Required by *Robbins Tire* Was Met by ATF in this Case.

At the district court level, ATF submitted the Declaration of Assistant Director of Field Operations for ATF, David L. Benton. To satisfy the inquiry regarding the likely "interference" to enforcement proceedings, Mr. Benton discussed and illustrated how information related to ongoing criminal investigations is used by the ATF, and potentially criminals. As stated in the declaration, a requesting law enforcement agency provides ATF with manufacturer, weapon type, caliber and serial number information recovered in connection with a crime, and investigation of the same. ATF then conducts a trace regarding the firearm information. That trace data is then used by thousands of law enforcement agencies, both state and local, to link suspects to firearm-related criminal investigations, to identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. Because of the voluminous trace requests that are received by ATF, it is practically impossible to monitor the status of each pending criminal investigation. Such monitoring can be overly burdensome on ATF and FOP member agencies. Therefore, to require ATF to provide specific "concrete examples" of *exactly how* an ongoing investigation may be jeopardized is illogical and virtually impossible, not to mention unnecessary under FOIA Exemption (7)(A) and Supreme Court precedent.

The express language of FOIA Exemption (7)(A) permits exemption based on this reasonable expectation of interfer-

ence. Under well-established Supreme Court precedent, this "reasonable expectation" can be illustrated without necessarily requiring "specific instances" or "concrete examples" of the potential interference. That showing was met by ATF, *sub judice,* with the declaration of David L. Benton.

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;

- Instantly, he or she has the following information:
  - Suspected crime(s);
  - Suspected crime location(s);
  - Suspected crime weapon(s);
  - Suspects and their associates;
  - Law enforcement officer names, departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witness information.

- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. FOP member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. FOP member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

Regarding the ATF data, including notations, the district court judge clearly articulated his belief that such information "involves revealing investigations underway," and that such information was not to be released. (*Id.* at p. 28-29, Appendix E hereto).

D. The Expectation of Confidentiality Among Law Enforcement Agencies.[6]

As further support for the generally contemplated "interference" that would result by ATF disclosure, the FOP respectfully requests this Court review the more than forty (40) Memoranda of Understanding (MOU) currently in effect between ATF and law enforcement agencies nationwide. (See Appendix B, attached hereto). These Memoranda reflect the mutual interests of ATF and state or local agencies requesting ATF trace data to maintain the confidentiality of the data maintained and exchanged between ATF and these requesting law enforcement agencies. Not only do the MOU themselves stand for the proposition that disclosure of such information would interfere with ongoing criminal investigations, but they expressly state so:

> ***The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings.*** This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. ***It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.***

[6]See also the correspondence of Raymond W. Kelly, City of New York Police Commissioner (Appendix C hereto), submitted in support of ATF's decision to withhold the same trace firearms data in NAACP v. Accusport Corp., et al., 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.).

See City of Chicago Memorandum of Understanding, (emphasis added) (Appendix B, p. 3).

Of particular interest is the MOU between ATF and the City of Chicago Police Department, quoted above. (See Appendix B, attached hereto). Why else would the City of Chicago Police Department enter into a written agreement evincing mutual interests and benefits of confidentiality regarding the release of trace firearms data, if not to preserve the efforts of investigations from the possibilities of "interference" therewith? Logically, and by tacit admission, the answer is because release of the trace firearms data would compromise effectiveness of criminal investigations in the usual, normal context which this information is used:

> In keeping with our shared responsibility for community protection I am pleased to enclose the Youth Crime Gun Interdiction Initiative Memorandum of Understanding which has been signed by Superintendent Terry G. Hillard. *** Very truly yours, Karen A. Rowan, General Counsel to the Superintendent.

See, City of Chicago Memorandum of Understanding and cover letter thereto (Appendix B).

Stated another way, the City of Chicago expects confidentiality for its normal course of business, but rebuffs those same interests in this lawsuit.

See also the Affidavit of Harold Litwin, Chief of Operations for the City of Buffalo Police Department. That affidavit, submitted in support of the ATF in *NAACP v. Accusport Corp., et al.*, supra., describes the significance of the firearms trace data as an investigative tool for the City of Buffalo. That affidavit also elaborates on the negative consequences that would result if disclosure of ATF firearms trace data is ordered. Discussed at length on pages 3-6 are the normal and customary practices to withhold and keep confidential this information, because of the obvious safety concerns for law enforcement personnel conducting criminal investigations. Also therein, Mr. Litwin described how a virtually "contemporary disclosure" of information can educate a criminal suspect so as to potentially evade capture or otherwise compromise the criminal investigation.

The testimony offered by Messrs. Benton and Litwin is solid, reasonable, and based on their respective 27 and 34 years in law enforcement. These affidavits reflect - very clearly - the interference reasonably contemplated with the release of investigatory information. The FOP respectfully submits that if common sense and thought do not obviate these consequences, this testimony, and surely these general circumstances based on actual practice, satisfy the *Robbins Tire* standard.

Finally, the FOP would respectfully draw the Court's attention to the Affidavit of Pedro J. Perez, Assistant Deputy

Superintendent for the New York State Police. Submitted in the *NAACP v. Accusport Corp., et al.*, supra. litigation, Assistant Deputy Perez offers testimony based on his twenty (20) years of law enforcement work and his department's use of ATF firearms trace data.

As attested to by Assistant Deputy Perez, ATF firearms trace data is a significant investigatory tool used to assist officers in identifying individual armed criminals and developing proactive local investigative and strategic analysis to target armed violent criminals for prosecution.

Mr. Perez discussed the grave consequences that result from premature disclosure of the investigative data. In addition to the risks of exposure for undercover officers and agents, Mr. Perez cites far-reaching results, such as the use of investigatory information by criminals to learn about, expose, avoid and/or thwart law enforcement investigation techniques and efforts. Moreover, Mr. Perez cites the example of the Columbine massacre, where premature release of ATF firearms trace data is considered to have possibly compromised the investigation of those firearms purchases.

Again, such examples and inferences of the consequences (i.e., expected interference) are reasonably foreseeable. This discussion and analysis, like that submitted by ATF with the Declaration of David L. Benton, presents a sufficient *Robbins Tire* showing to preclude the requested disclosures.

E. *NAACP v. Accusport Corp., et al.*, 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.).

The issue of FOIA disclosure and exemptions for this firearms trace data was also at issue in *NAACP v. Accusport Corp, et al.*, supra. There, District Judge Weinstein in the District Court for the Eastern District of New York recently acknowledged the obvious "interference" of disclosure to law enforcement efforts.

Regarding the requested release of individual names and identities, Judge Weinstein remarked:

> "I will not force BATF to give you identities." (*NAACP v. Accusport Corp., et al.*, Transcript of Civil Cause for Motion p. 34, Appendix E hereto).
>
> "That's the kind of investigative material nobody should get." (*Id.* at page 35).

Regarding the requested release of names and information of persons from whom firearms have been recovered, Judge Weinstein stated:

> "Denied. This kind of information would be destructive of the whole system of criminal investigations." (*Id.* at p. 36).

Finally, in attempting to craft the order for confidential disclosure of certain ATF data, the Court acknowledged the interests at stake:

> "We want to do it in a way that doesn't in the least jeopardize any current or future criminal investigations." (*Id.* at p. 41).

For the Court's convenience, the hearing transcript wherein this issue was thoroughly discussed and debated is attached hereto as Appendix E. The rulings of Judge Weinstein reflect the interference reasonably expected from release of such data.

F. Chilling Effect

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

III. CONCLUSION

This Brief is intended to provide the Court with the practical consequences of the Seventh Circuit Court of Appeals' decision and ordered disclosure of ATF firearms trace data, the results of which will have significant effects on the work

and efforts of law enforcement personnel. Ultimately, if law enforcement efforts are hindered, tampered with, eluded or precluded altogether, criminal wrongdoing may go undetected and/or unpunished. Even worse, release of this data may result in the lives of witnesses or law enforcement being threatened. Those consequences could be disastrous.

The FOP respectfully requests this Court apply the FOIA statutory exemptions and the legal precedent of *Robbins Tire* and overturn the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

LARRY H. JAMES, (0021773)
Counsel of Record
CHRISTINA L. CORL (0067869)
LAURA MacGREGOR COMEK (0070959)
Of Counsel
CRABBE, BROWN & JAMES, LLP
500 South Front Street, Suite 1200
Columbus, OH 43215
(614) 228-5511
Attorneys for *Amicus Curiae*
Fraternal Order of Police

APPENDIX

APPENDIX A – BRIEF OF AMICUS CURIAE THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*, DATED JUNE 7, 2002

No. 01-2167

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*

LARRY H. JAMES (0021773)
CHRISTINA L. CORL (0067869)
LAURA M. COMEK (0070959)
CRABBE, BROWN & JAMES
500 South Front Street, Suite 1200
Columbus, OH 43215
(614) 228-5511
Attorneys for *Amicus Curiae*
The Fraternal Order of Police

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: No.02-2167

Short Caption: City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Fraternal Order of Police

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Crabbe, Brown & James, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more the party's or amicus' stock:

None

Attorney's Signature:_____
Date:_____

Attorney's Printed Name: **Larry H. James**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No.__

Address: **500 South Front Street, Suite 1200, Columbus, Ohio 43215**

Phone Number: **(614) 229-4567**

Fax Number: **(614) 229-4559**

E-Mail Address: **LJames@CBJLawyers. com.**

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF APPROPRIATENESS FOR REHEARING EN BANC 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

1. Nature of the Case and Disposition Below 2

2. Factual Background 3

SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. Because of the Exceptional Importance of This Issue to Law Enforcement Personnel (i.e., the significant risk of harm to law enforcement personnel), as Well as the Fact That the Panel's Decision is in Conflict With the Standard Set in the Case of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Matter is Appropriate for Rehearing *En Banc* 8

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES:

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)..... 2, 4, 9, 10

COURT OF APPEALS CASES:

City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, 287 F.3d 628 (7th Cir. 2002)..... 3

Marzen v. H.H.S., 632 F. Supp. 785, 806 (N.D. Ill. 1985) *aff'd* 825 F.2d 1148 (7th Cir. 1987)..... 11

Solar Sources Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998)..... 8

STATUTES:

Freedom of Information Act., 5 U.S.C. 5 U.S.C. § 552(b)(7)(A)..... 2, 3, 4, 9,10, 11

Pub. L. No. 99-570, §1802, 100 Stat. 3207-48. 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2167

CITY OF CHICAGO,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*

STATEMENT OF APPROPRIATENESS FOR REHEARING *EN BANC*

The issues raised in the Petition for Rehear ing En Banc, are of exceptional importance to the 298,852 members of *Amicus Curiae,* The Fraternal Order of Police. The Fraternal Order of Police represents law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. The subject of this appeal is the court-ordered disclosure under the Freedom of Information Act of investigative firearm information from the ATF. Disclosure of this information will greatly inter

fere with thousands of ongoing criminal investigations, and jeopardize the lives and safety of law enforcement personnel represented by The Fraternal Order of Police. In addition, the ruling from the three (3) judge Panel of this Court, which Appellant now seeks to be reheard en banc, clearly conflicts with the United States Supreme Court case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978) and its progeny.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether certain records maintained by the Bureau of Alcohol, Tobacco, and Firearms (ATF) regarding the tracing of firearms involved in crimes and the multiple sales of handguns are protected from disclosure under Exemption 7(A) of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(7)(A), which exempts from disclosure of "records or information compiled for law enforcement purposes," to the extent that the production of such records "could responsibly be expected to interfere with enforcement proceedings."

STATEMENT OF THE CASE

1. Nature of the Case and Disposition Below.

The City of Chicago brought this action under the Freedom of Information Act, seeking certain records maintained by the ATF regarding the tracing of firearms involved in crimes and multiple sales of handguns. The ATF provided to the City all of the requested data concerning Chicago guns,

and the vast majority of nationwide data, but withheld certain nationwide data for a period of one to five years under Exemption 7(A), because release of the data could reasonably be expected to interfere with law enforcement proceedings or ongoing investigations. In addition, the ATF withheld individual names and addresses indefinitely, under Exemptions 6 and 7(C), to protect personal privacy.

Both parties moved for summary judgment, and on March 6, 2001, the District Court granted the City's Motion and denied the ATF's Motion. The court held that the withheld information was not protected from disclosure under the asserted exemptions.

On March 13, 2001, the City moved to amend the judgment. On March 21, 2001, the court granted the City's Motion, in part, and denied it in part. On the same date, the court granted the government's Motion for a stay pending appeal. On May 4, 2001, the Appellant ATF filed a timely Notice of Appeal. On April 25, 2002, a three (3) judge Panel of this Court issued its decision upholding the findings of the District Court. ***City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms***, 287 F.3d 628 (7th Cir. 2002). The ATF and this *Amicus Curiae,* The Fraternal Order of Police, now move this Court for a rehearing en banc on the issues presented.

2. Factual Background.

The Appellant ATF provides firearms tracing services in support of criminal investigations to federal, state, local and

international law enforcement agencies. Officials at ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided pursuant to a trace request, into the trace database sub-module of the Firearms Tracing System (FTS), which collects tracking data on traces of firearms suspected of being involved in a crime. See Appellant's Appendix (Apt. App. at 58-59 ¶ 11). Requests from over 17,000 law enforcement agencies in the United States and abroad (other than the ATF), comprise the bulk of firearms traces conducted by the ATF. A requesting law enforcement agency must have an open investigation to even request that a trace be conducted by the ATF. (Apt. App at pp. 3-4, ¶ 11).

SUMMARY OF ARGUMENT

The safety and mission of law enforcement, and of the men and women who carry out law enforcement, is exactly at the center of the issues presented in this case. There can be little doubt that the Court's decision that these records are not protected by Exemption 7(A) of the Freedom of Information Act will result in jeopardized safety to law enforcement personnel involved in ongoing investigations. As established by the Declaration of then Assistant Director for Field Operations, and now Deputy Director of ATF, David L. Benton, information in the Firearms Tracing System is compiled by information received from local, state and international law enforcement agencies seeking and providing information regarding ongoing criminal investigations. (Apt. App. at pp 3-4, ¶ 11). This compiled information includes

witness names, law enforcement names and departments, gun dealers, other suspects and other suspected crimes. And again, no request would have been made by the law enforcement agency unless an active investigation were ongoing. Thus, requiring the ATF to release information (witness and law enforcement names) that is necessarily related to an ongoing law enforcement investigation, can reasonably be expected to interfere with these investigations and put law enforcement officers in harm's way.

Further, the Court applied an incorrect standard for determining application of Exemption 7(A), as set forth in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). In the ***NLRB v. Robbins Tire & Rubber Co.*** case, the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that the release of specific information withheld would interfere with a specific enforcement proceeding. Instead, an agency need show only " . . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference." 437 U.S. at 236. **There are at least 298,852 reasons why this standard should be applied as intended by the United States Supreme Court.**

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;
- Instantly, he or she has the following information
    - Suspected crimes;
    - Suspected crime location;
    - Suspected crime weapons;
    - Suspects and their associates;
    - Law enforcement officer names and departments, case numbers, etc.;
    - Other suspected crimes; and
    - Witnesses.
- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fraternal Order of Police member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by the ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of

compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

The Fraternal Order of Police and its 298,852 members take very seriously the firearms reduction strategy that is being pursued, by using the ATF database. However, if law enforcement agencies cannot trust that the gun tracing information provided to the ATF will be held in confidence for at least a certain period of time to allow for the completion of the criminal investigation, there is no question that the law enforcement agencies will be reluctant to provide this valuable gun tracing information to the ATF database. Thus, a blanket disclosure policy with respect to the sensitive law enforcement information in these databases will result in the refusal of many agencies to conduct comprehensive tracing of crime guns. This will adversely impact the utility of the ATF's entire crime gun tracing program. Since the ATF's crime gun tracing program is part of a larger law enforcement and gun proliferation reduction strategy shared by many levels of law enforcement agencies nationwide, the Panel's decision regarding the release of this information will have a chilling effect on all law enforcement initiatives, not only the ATF database at issue in this case.

The three (3) judge Panel in its Opinion failed to appropriately apply the standard, and held that the exemption does not shield any of the requested data from disclosure because the ATF ". . . made simply no showing that enforcement proceedings are 'pending or reasonably anticipated' beyond mere hypothetical scenarios." 287 F.3d at *12. To the contrary, ATF provided specific examples of the types of harm that would result from the premature disclosure of trace data.

This holding misapplies and misconstrues the United States Supreme Court standard set forth in ***Robbins Tire***. In that regard, this holding serves to endanger law enforcement personnel engaged in open and pending criminal investigations, by giving them enough information to further conceal crime, elude capture and identify potential witnesses and law enforcement officials. The Fraternal Order of Police is here to say that there are thousands of ongoing criminal investigations that could reasonably be expected to be compromised by the Panel's decision.[1]

Confidentiality is the cornerstone of effective law enforcement investigation. It is the one tool that cannot be compromised nor negotiated away. To do so exposes law enforcement officials and the public to a better-informed and more effective criminal element. In short, this decision, if left to stand, provides the criminal with direct access to information that would greatly assist the criminal in carrying

---

[1]Since the issuance of the District Court's ruling on this issue in 2001, many of the cities that provide tracing data to ATF pursuant to the Youth Crime Gun interdiction initiative, a comprehensive firearms tracing initiative, have signed memoranda of understanding ("MOU") with ATF. They specifically request that the information submitted to ATF be accorded confidentiality, and specifically set forth the harms that would be caused to open investigations by disclosure, and request that their trace information not be released by ATF without their prior consent. The Fraternal Order of Police fully supports this concept, and understands that the four (4) jurisdictions that purported to support Chicago's position in the District have signed these MOU. However, because of the Panel's decision, ATF is effectively precluded from asserting applicable FOIA exemptions with respect to this data.

out criminal activity, as well as an aide in avoiding detection from the law and endangering the public. Most importantly, this decision goes beyond any constitutional safeguards imaginable and places law enforcement on a slippery slope that will be difficult, if not impossible, to reverse.

ARGUMENT

I. Because of the Exceptional Importance of this Issue to Law Enforcement Personnel (i.e., the Significant Risk of Harm to Law Enforcement Personnel), as Well as the Fact That the Panel's Decision Is in Conflict With the Standard Set in the Case of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Matter Is Appropriate for Rehearing En Banc.

The release by the ATF of firearms tracing data supplied by law enforcement agencies during the pendency of ongoing criminal investigations is of exceptional importance, both to the integrity of criminal investigations around the United States and the safety of law enforcement officers involved in those investigations. The Fraternal Order of Police represents 298,852 law enforcement personnel from various agencies all over the United States. The impact of the Panel's ruling dramatically effects the day-to-day lives of law enforcement personnel employed on the streets of this country. The contemporaneous public release of information tied directly to ongoing criminal investigations will hinder the law enforcement agency's ability to control its investigation, enable suspects to elude detection and intimidate witnesses, prematurely reveal evidence or strategy, and potentially put the lives of law enforcement personnel in danger. *See e.g.*

Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998).

The Panel in this case held that the firearms tracing information must be disclosed by the ATF because the ATF " . . . failed to identify any particular ongoing investigations, . . ." and ". . . failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." 287 F.3d at *11-12. It is axiomatic that because the criminal investigation is the reason this data is collected from law enforcement agencies, release of that information can reasonably be expected to relate to ongoing or prospective law enforcement proceedings and investigations. As is stated in the Declaration of Assistant Director of Field Operations for the ATF, David L. Benton, the requesting law enforcement agency provides the ATF with the manufacturer, weapon type, caliber, and serial number of a firearm recovered in connection with a crime and investigation of the same. (Apt. App. at p. 5, ¶ 15). The ATF then conducts a trace regarding the firearm information. That trace data is then used to link suspects to firearm-related criminal investigations, identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. (Apt. App. at p. 5, ¶ 17). Because of the sheer volume of trace requests that are received by the ATF, it is impossible to monitor the status of each pending criminal investigation. (Apt. App. at p. 5, ¶¶19, 20). Such monitoring would be extremely burdensome on ATF and Fraternal Order of Police member agencies, particularly if there is no enforcement reason for either ATF or Fraternal Order of Police to do so, unless working on a case with ATF. Therefore, to require the ATF

to provide specific "concrete examples" of ongoing investigations that may be jeopardized is not only illogical, but virtually impossible and not required under Exemption 7(A) Supreme Court precedent. Simply put, the trace data would not even be in the ATF database if there were not already an ongoing criminal investigation. It is axiomatic that to provide the trace data to any person who requests this information would jeopardize the effectiveness of law enforcement officers of ongoing criminal investigations, as well as potentially jeopardize the safety of law enforcement personnel working undercover or in other capacities in the criminal investigations.

Also worthy of mention is the fact that the ATF only seeks to withhold this law enforcement-sensitive data under Exemption 7(A) for a limited period of time. Certain information reasonably expected to interfere with enforcement proceedings would be held from FOIA disclosure for a period of one (1) year, not indefinitely. Surely, this balancing of public interest in disclosure, versus the release of sensitive crime gun data, satisfies the balancing analysis first set forth by the Supreme Court in ***Robbins Tire***, wherein the Court stated:

> A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the . . . delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.

437 U.S. at 236.

The same is true in the present case. Contemporaneous release of trace data to law enforcement and the general public would allow media, and anyone else, to "get out ahead" of an investigation. This would complicate an investigation in any number of ways, such as by "tipping off" suspects or tainting and/or endangering witnesses and law enforcement officers. It appears that the Panel in its analysis overlooked or disregarded this important balancing analysis. This certainly is an issue to be examined on rehearing en banc. The Fraternal Order of Police fully supports ATF's position to release the trace data after the one (1) year period following the trace.

Further, included among the federal agencies that submit gun trace requests are agencies that submit requests regarding the movement of arms overseas. (Apt. App. at pp. 6-7, ¶ 21). It scarcely needs repeating that as a result of recent world events and terrorist attacks on United States' soil, the confidentiality of tracing data for the movement of firearms overseas is of the utmost importance. It does not appear that the Panel in this case considered the far-reaching and potentially deadly implications of the decision that the firearm tracing data is not exempt from disclosure pursuant to Exemption 7(A). As has been disclosed in recent news reports, the monitoring of potential terrorist activity, including the tracking of weapons movement overseas, can potentially be used to prevent future terrorist attacks on American soil. The Panel's mandate that the ATF be required to provide "concrete examples of ongoing investigations that could be jeopardized" ignores the monumental potential for harm,

should this crime gun tracing information be released to any person who simply files a FOIA request.

In addition to the danger the Panel's decision poses to law enforcement personnel as stated above, the Panel misconstrued clear United States Supreme Court precedent set out in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). The Panel suggested in its Opinion that Exemption 7(A) did not apply to this case for two (2) reasons. The first was that the "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." 287 F.3d at 12. The second was that the ATF's witnesses "failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." ***Id.*** The Panel's holding in this regard is contrary to the "generic" approach adopted by the United States Supreme Court in this area.

In ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978), the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that release of the specific information withheld would interfere with any specific enforcement proceeding. Instead, an agency need only show ". . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference. . . ." 437 U.S. at 236. This approval of an agency's use of a generic approach has been further bolstered by Congress' Amendment of Exemption 7(A) in 1986, which lessened the showing of harm required for a demonstration that release of the information "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings. *See* ***Pub. L. No. 99-570, §1802, 100 Stat. 3207-48.*** Moreover, the Seventh Circuit has upheld the generic approach to the existence of prospective enforcement proceedings, without requiring the agency to establish the existence of specific, open investigations. *See e.g.* ***Marzen v. H.H.S.***, 632 F. Supp. 785, 806 (N.D. Ill. 1985) *aff'd* 825 F.2d 1148 (7th Cir. 1987)(holding that medical records that H.H.S. obtained from hospitals fell within the protection of Exemption 7(A) where the release of such records would harm the government's ability to obtain such records in the future, thus interfering with its ability to enforce federal law). Therefore, the standard applied by the Panel in determining that Exemption 7(A) did not apply in this case clearly conflicts with prior Supreme Court and Seventh Circuit precedent.

Further, because of the sheer volume of trace requests received from law enforcement agencies every year, it is simply impossible to provide "concrete" examples of ongoing investigations that could be jeopardized. (Apt. App. at pp. 6, ¶ 19). The Panel missed the obvious point that at the time the trace requests are submitted from law enforcement agencies, they are the subject of thousands of ongoing criminal investigations. Thus, there is no question that much of the requested data that has been ordered to be disclosed is related to witnesses, suspects and undercover operatives in on-

going law enforcement proceedings and criminal investigations. The requirement that the ATF more specifically document its reasons for withholding the required national database information is not only impossible, but also unnecessary. It is axiomatic that at least a portion of the requested data, since it was provided during the course of an ongoing law enforcement investigation, would still relate to an ongoing law enforcement investigation. Requiring this data to be released on the erroneous grounds that disclosure could not reasonably be expected to interfere with enforcement proceedings, turns a blind eye to not only the reality of law enforcement investigations, but also to the safety of individual officers who may be involved in dangerous investigations or even be acting in an undercover capacity that could be jeopardized.

CONCLUSION

Because the three (3) judge Panel's decision in this case is of exceptional importance to the law enforcement community, and because that decision is in clear conflict with Supreme Court and Seventh Circuit precedent, *Amicus Curiae,* The Fraternal Order of Police, respectfully requests this Honorable Court to reconsider this matter en banc.

LARRY H. JAMES (0021773)
CHRISTINA L. CORL (0067869)
LAURA M. COMEK (0070959)
CRABBE, BROWN & JAMES
500 South Front Street, Suite 1200
Columbus, OH 43215
(614) 228-5511
Attorneys for *Amicus Curiae*
Fraternal Order of Police

CERTIFICATE OF COMPLIANCE

Now comes Counsel for *Amicus Curiae,* The Fraternal Order of Police, pursuant to Rule 32(a)(7) and certifies that the Brief complies with the type-volume limitation. Counsel certifies that *Amicus Curiae* The Fraternal Order of Police's Brief contains 4,580 words.

LARRY H. JAMES (0021773)
CHRISTINA L. CORL (0067869)
LAURA M. COMEK (0070959)

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2002, I transmitted the original and 30 copies of the foregoing *Amicus Curiae* Brief of the Fraternal Order of Police in Support of Petition for Rehearing En Banc, along with a digital version in PDF format, to the Court's web cite and to each party as listed below via regular U.S. Mail and PDF file, or floppy disk:

Michael A. Forti, Esq.
Benna Soloman, Esq.
David Graver, Esq.
30 North LaSalle Street
Suite 800
Chicago, IL 60602
(312) 742-0115

Stuart E. Schiffer, Esq.
Scott R. Lassar, Esq.
Leonard Schaitman, Esq.
Steve Frank, Esq.
Civil Division
Department of Justice
601 D. St., N.W., Rm 9534
Washington, D.C. 20530

Michael J. Hayes, Sr.
Gardner, Carton & Douglas
321 N. Clark Street, Suite 3400
Chicago, IL 60610-4795
(312) 644-3000

LARRY H. JAMES (0021773)
CHRISTINA L. CORL (0067869)
LAURA M. COMEK (0070959)

APPENDIX B – CITY OF CHICAGO MEMORANDUM OF UNDERSTANDING, DATED SEPTEMBER 18, 2001

September 24, 2001

Larry Ford
Special Agent In Charge
A.T.F.
300 South Riverside Plaza
Suite 350 South
Chicago, Illinois 60606

Re: Youth Crime Gun Interdiction Initiative
OLA File No.: 124/016

Dear Special Agent Ford:

In keeping with our shared responsibility for community protection I am pleased to enclose the Youth Crime Gun Interdiction Initiative Memorandum of Understanding which has been signed by Superintendent Terry G. Hillard.

Should any questions arise or if I or my staff can ever be of further assistance to your office, please do not hesitate to contact me at 312-745-6115.

Very truly yours,

Karen A. Rowan
General Counsel to the Superintendent

Enclosure

THE YOUTH CRIME GUN INTERDICTION INITIATIVE (YCGII) MEMORANDUM OF UNDERSTANDING

The parties signing this memorandum of understanding hereto agree that it is to their mutual benefit to cooperate in eliminating the illegal flow of firearms to youth through enforcement efforts involving the investigation and prosecution of illegal firearms traffickers and through study focusing on the illegal youth firearms market to determine the trends, patterns, and scope of that market and develop effective strategies to address the market.

BACKGROUND

The YCGII was developed by the Department of the Treasury (Enforcement) and the Bureau of Alcohol, Tobacco and Firearms (ATF) in partnership with the Department of Justices' Office of Community Oriented Policing Services (COPS) and the National Institute of Justice (NIJ). Need for the YCGII sterns from the fact that firearms related to youth homicides have nearly tripled since 1985. Through intervention in the illicit firearms markets, we will try to reduce or stop the upward spiral of youth on youth firearms related homicides.

To accomplish this, the YCGII will not be strictly limited to focusing on illegal traffickers of firearms to the Federally defined "juvenile." Rather, participating (ATF) field offices and police departments will focus on illegal firearms traffickers to youth, understood as including the Federally defined under 18 years of age, with flexibility to focus on

illegal firearms traffickers who supply young people up to 24 years or older if circumstances warrant.

PURPOSE:

This memorandum will formalize relationships between the participating agencies with regard to policy and procedures, utilization of resources, and planning/training in order to maximize interagency cooperation and coordination.

OBJECTIVES:

The nationwide YCGII program has four basic interrelated objectives which will apply in each site:

1. working with U.S. Attorneys and State/local procedures to intensify ATF and local police efforts to investigate and incarcerate individuals who illegally traffic in firearms to young people and ensure those arrested are prosecuted in the appropriate venue, which shall be determined on a case by case basis.

2. to ensure local police departments trace all crime guns recovered, and in particular, those firearms taken from youth.

3. to combine the efforts of ATF special agents, local police and NIJ researchers to develop new methods of mapping illegal firearms trafficking patterns and practices, especially as this relates to the illegal trafficking of firearms to youth.

4. to provide more ATF support for State and local enforcement efforts aimed at intervening in the illegal local youth firearms market.

CONDITIONS AND PROCDURES:

- ATF agrees to furnish an ATF owned laptop computer to the Chicago Police Department. The Chicago Police Department agrees and acknowledges that this equipment shall remain the property of ATF and the U.S. Government, unless otherwise specified.
- The Chicago Police Department agrees to assume the cost of replacement or repair of ATF owned equipment, in the event of unauthorized movement, alteration, damage or destruction caused by its employees, contractors, or any other person under its control.
- ATF retains the right to remove ATF owned equipment upon (1) receipt of written notification of the termination of participation in the YCGII by the Chicago Police Department; (2) termination of the YCGII program by ATF, or (3) the cancellation of this MOU by ATF. If the ATF owned equipment will be removed from the Chicago Police Department, written notice of the removal will be provided by ATF not less than 10 business days to the actual removal of the equipment.
- ATF and the Chicago Police Department acknowledge their understanding that the operations described in this MOU are subject to audit by ATF; the U.S. Department of the Treasury, Office of Inspector General; the General Accounting Office; and other auditors designated by the U.S. Government. Such audit may include reviews of any and all records,

documents, reports, accounts, invoices, receipts, or other evidence.

- The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings. This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.

CONCLUSION

It is the intent of the signatories that this agreement ensures coordination, cooperation and the mutual conduct of enforcement and research activities. The result of this mutual cooperation and coordination will be the successful prosecution of illegal firearms in State and Federal jurisdictions as well as the development of an accurate picture of the illegal youth firearms market and the development of new strategies to effectively interrupt this market and impact on the rate of juvenile related firearms violence. The research findings will be published at the conclusion of this initiative for the benefit of all law enforcement.

Parties to this agreement may terminate their participation at any time upon written notification of their intent to with-

draw to all other parties in the agreement. At such time that other Federal government resources may become available, a new Memorandum of Understanding will be initiated.

In witness whereof, the parties have hereunto executed this Memorandum of Understanding.

_____	_____
Name	Name
_____	_____
Title	Title
_____	_____
Department	Department

APPENDIX C – CORRESPONDENCE OF RAYMOND W. KELLY, CITY OF NEW YORK POLICE COMMISSIONER, DATED AUGUST 19, 2002

THE POLICE COMMISSIONER
CITY OF NEW YORK

August 19, 2002

Honorable John Ashcroft
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Ashcroft:

I am writing to express my concern about the possibility that firearms trace information compiled by the Bureau of Alcohol, Tobacco, and Firearms (ATF) tracing system might be released in ways that will compromise critical law enforcement investigation and endanger the lives of Police Officers and members of the public.

It is my understanding that the recent decision by the Seventh Circuit Court of Appeals (in the Case of *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*) and the court's denial of a request for *en banc* rehearing, if allowed to stand, will permit contemporaneous, unredacted disclosure of firearms trace information to anyone who asks for it, including the very criminals who are under investigation. Such a result clearly would be catastrophic for law enforcement, would compro-

mise national security, and would signal the end of the trace program, as law enforcement agencies would no longer be able to rely on the current ability to share critical information confidentially.

Law enforcement agencies at every level rely on the ATF's tracing system and resources to advance critically important investigations. The use of these traces has resulted in the successful closure of many criminal investigations, the conviction of numerous firearms offenders, the recovery of thousands of illegal firearms form unlicensed possessors, and the dismantling of many insidious and violent criminal organizations. The ability to trace firearms, therefore, has become an essential tool in conducting a wide array of critical and sensitive law enforcement investigations. The use of this resource by local and state agencies also is a dramatic illustration of the need for and benefits of a continuing, close, and confidential cooperative relationship with federal agencies to prevent and solve crimes.

The prospect that information obtained through these traces may be available for release by request to ATF under the Freedom of Information Act (FOIA) is therefore quite disturbing. Even more alarming is the possibility that this information might be released while the investigation remains open. The release of trace information under FOIA seriously jeopardizes not only the investigations, but also the lives of law enforcement officers, informants, witnesses, and others. Even when the information does not identify specific individuals who may be endangered, merely disclosing that a trace was conducted may be enough to create a grave threat to life, to result in the flight of the suspects or the destruc-

tions of evidence, or to otherwise compromise investigations in which law enforcement agencies have invested so much. The possibility that information concerning investigations may be released and used in these ways may, in fact, result in some agencies discontinuing –or at least curtailing – their use of the trace system. Thus, the effectiveness of the overall trace system, as well as the essential relationship of cooperation that has been cultivated between federal and local law enforcement, also would be seriously undermined.

Accordingly, in order to ensure that this information is not released inappropriately, and that the ability to conduct such traces remains a useful tool for all law enforcement agencies, I wholeheartedly support ATF's efforts to protect and preserve the confidentiality of firearms trace records and information, and I encourage you to pursue an appeal of this case by seeking a writ of certiorari from the United States Supreme Court. Please do not hesitate to contact me if I may be of further assistance in this effort.

Sincerely,

Raymond W. Kelly
Police Commissioner

APPENDIX D- AFFIDAVIT OF PEDRO J. PEREZ, NEW YORK STATE POLICE, ASSISTANT DEPUTY SUPERINTENDENT, DATED JULY 10, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-3999

- against -

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-7037

- against -

(Weinstein, J.)
(Pollack, M.J)

ACUSPORT, CORP., et al.

Defendants.

Pedro J. Perez, as his declaration, pursuant to 28 U.S.C. § 1746, states:

1. I am the Assistant Deputy Superintendent for the New York State Police. In this position, my responsibilities

include supervision of the Bureau of Criminal Investigation. I have been with the New York State Police for 20 years. I have had extensive experience in criminal investigations involving firearms throughout my career. I have also supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the New York State Police, in these investigations, is the tracing of firearms by the Bureau of Alcohol, Tobacco, and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. The Bureau of Alcohol, Tobacco, and Firearms (ATF) provides firearms tracing services in support of criminal investigations to our Department. Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently provides the general public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If

ATF were to fully disclose the firearms tracing information sought by subpoena in this case, criminals, who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosures are too grave to rely on safeguards currently in place, such as "do not contact" codes. To protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harm at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could

easily see what guns were recently traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation of ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to reduce

firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their *modus operandi* if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace request that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation with

another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 10th day of July 2002.

Pedro J. Perez

Law Offices

Crabbe, Brown & James, LLP

500 South Front Street
Suite 1200
Columbus, Ohio 43215

Telephone: 614.228.5511
Fax: 614.229.4559

Email: Lcomek@cbjlawyers.com
www.CBJLawyers.com

WRITERS DIRECT DIAL NUMBER
229.4557

September 26, 2002

Via facsimile and regular U.S. Mail
Maria S. Georges, Esq.
Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602

Benna Ruth Solomon, Esq.
Chief Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602

David A. Graver, Esq.
Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602

Re: Bureau of Alcohol, Tobacco and Firearms v. City of Chicago
U.S. Supreme Court Case No. 02-322
Our File No. 10093-29014

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation with David Graver regarding the above-reference United States Supreme Court case. Pursuant to our discussion, the City of Chicago has given its consent to the National Fraternal Order of Police to submit and amicus brief in support of the Petition for Writ of Certiorari filed by ATF in this matter. As we discussed, this consent is necessary pursuant to Supreme Court Rule 37.

If you have any questions or if I can be of assistance, please do not hesitate to contact me. Otherwise, this correspondence will serve to confirm our discussion and your agreement to the same. Thank you again for your assistance.

Very truly yours,

Laura MacGregor Comek

LMC:rm

cc: Larry H. James
General Counsel, National Fraternal Order of Police

APPENDIX E – TRANSCRIPT OF CIVIL CAUSE FOR MOTION BEFORE THE HONORABLE JACK B. WEINSTEIN UNITED STATES DISTRICT COURT JUDGE, DATED SEPTEMBER 9, 2002

NAACP,	:	CV 99-3999
Plaintiff	:	United States Courthouse Brooklyn, New York
v.	:	
ACCUSPORT CORP., et al	:	September 9, 2002 1:00 p.m.
Defendants.		

TRANSCRIPT OF CIVIL CAUSE FOR MOTION BEFORE THE HONORABLE JACK B. WEINSTEIN UNITED STATES DISTRICT COURT JUDGE

Appearances:

For Plaintiff:	Elisa Barnes, Esq. 111 Broadway New York, New York 10006
For Defendant Gorly: Dist, et al.	Budd Larner 127 Peachtree St. NE Atlanta, Georgia By: Timothy A. Baumann, Esq.

For Defendant Glock:	Renzulli, Pisciotti & Renzulli, LLP 300 East 42nd Street New York, New York 10017-5947 By: John F. Renzulli, Esq.
Official Court Reporter Ph. (718) 260-2644 Fax (718) 260-4505	Stephanie Drexler, RPR 225 Cadman Plaza East Brooklyn, New York 11201
Appearances (cont'd):	
For Defendant Strum,: Ruger & Co.	Wildman, Harrold, Allen & Dixon 225 West Wacker Drive Chicago, Illinois 60606-1229 By: James P. Dorr, Esq.
For Defendant Sigarms	Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP 150 East 42nd Street New York, New York 10017 By: Robert L. Joyce, Esq.
For Defendant Heckler & Koch, Inc.	Holland & Knight, LLP 195 Broadway New York, New York 10007-3189 By: Marc L. Antonecchia, Esq.
For Defendant Fabbrica d'Armi, Pietro Beretta S.P.A.	Pavia & Harcourt, LLP 600 Madison Avenue New York, New York 10022 By: Victor Genecin, Esq.

Appearances (cont'd)

For Defendant North American Arms	Beckman and Associates Two Penn Center Plaza Philadelphia, Pennsylvania 19102 By: Bradley T. Beckman, Esq.
For Jerry's Defendants	Leahey & Johnson, P.C. 120 Wall Street New York, New York 10005 By: James P. Tenney, Esq.
For Defendant Farber: Bros, Inc., et al.	Saviano & Tobias, P.C. 9 East 40th Street New York, New York 10016 By: David G. Tobias, Esq.
For Defendant:	David R. Gross & Associates 33 Madison Avenue Morristown, New Jersey 07960 By: David R. Gross, Esq.
For ATF, Department: of Justice	Vincent Lipari, Esq. F. Franklin Amanat, Esq.
For ATF, Department: of the Treasury	Barry S. Orlow, Esq. Brian C. Kenrick, Esq.

THE COURT: Good morning. Thank you for coming in. I apologize for keeping you waiting.

Who would like to argue first?

MS. BARNES: Your Honor, I'm happy to.

Plaintiff moved before this Court in May of this year for an order to compel the BATF to produce certain fields of information that are not customarily produced in its public access database. Plaintiff's expert Dr. Andrews and Ms. Allen have worked very hard with the Special Master appointed in this matter and with BATF, its lawyers and its experts and have, we believe, resolved all the issues that plaintiff has with the BATF, we would then consider, with the agreement of the BATF and we would consider the issue of plaintiff's motion to be resolved.

MR. LIPARI: Afternoon, your Honor.

We did reach a conditional agreement with plaintiff, your Honor. That agreement is conditional on that information and that information only being disclosed. Our problem is if the cost of giving plaintiff that information is to give much more information to defendants, we are sort of back to where we started.

We do reserve all the rights and defenses we mentioned in our opening brief insofar as plaintiff is concerned, considering plaintiff, only we do have an agreement, I believe, subject to confidentiality restrictions which I don't believe are a problem.

THE COURT: Thank you.

Defendants?

MR. DORR: We are unaware of the nature of any agreement between the plaintiff.

THE COURT: I'm not aware of it. If there is an agreement, it should be placed on the record.

MR. LIPARI: It's not so much an agreement, it's that we agreed on the type of information in the proposed order that your Honor called for. We could live with the kind of information that plaintiff request and the information sort of mirrors each other.

THE COURT: As I understand it, you are proposing not the plaintiff's order but your own order?

MR. LIPARI: Correct.

THE COURT: Which differs somewhat?

MR. LIPARI: The confidentiality restrictions are much more severe. The information we disclose is identical, as I understand.

THE COURT: I thought the plaintiff wanted some other data.

MS. BARNES: There were some elements. There were two elements with regard to a purchaser, ID coding of purchaser IDs. We spelled them out in the proposed order, that we believe there was either an oral agreement with BATF or it was not specifically in the attachment A to the ATF's paper and Exhibit 11 to Mr. Dockery's report. But we believe

in substance we have reached an agreement as to the fields, as to the confidentiality, your Honor.

THE COURT: Excuse me. I have before me a BATF proposed order. I have an order from you and they are not congruent. As I understand it, the BATF wants its order signed; correct?

MR. ORLOW: Yes, your Honor.

THE COURT: As to the fields and as to the security.

MR. ORLOW: If I may, our proposed order doesn't specify the fields, it talks about confidentiality information. I think what Ms. Barnes is trying - -

THE COURT: It's in your appendix, isn't it?

MR. ORLOW: Yes, we did attach the fields. Actually, what plaintiff is asking for specifically is a very limited subset of the types of things that the defendant is looking for. The information that the plaintiff has in her revised order which was sent to us on September 6 is items we would be prepared to produce under the terms of our confidentiality language.

THE COURT: What I want you to do is give me an appendix A which will be revised to include what you are willing to give.

MR. ORLOW: The issue, if I may, is more with the defense at this point.

THE COURT: I have to issue an order. I have to be specific about what is or is not to be revealed. I have your ap-

pendix A. You are now telling me you are willing to expand appendix A. I want you, if you are willing to go further than what is in your appendix A, to give me a new appendix which will indicate what you are giving.

MR. ORLOW: Your Honor, I think the confusion is I think appendix A is what we are willing to give. What plaintiff is specifically asking for is only a subset of that.

THE COURT: You are giving it in effect in your appendix A?

MR. ORLOW: Yes, your Honor.

THE COURT: So there is no difference?

MS. BARNES: There are a few minor differences. How we understood your order, your Honor, was to spell out explicitly by field and data element what was the lowest amount we could live with. And as I understand it, ATF could agree to our proposed order with additions for their confidentiality.

THE COURT: I'm not going to take that kind of submission. BATF says that's what they are willing to give, appendix A. Give the defendant appendix A. They say within appendix A is what you are asking for. Whether it is or is not, I don't care. All I'm going to do is sign an appendix A, whatever it may be. We can't have modifications of this kind.

MS. BARNES: Then, your Honor, I believe if I could spend 15 minutes with Mr. Orlow, who I understand I don't have any issue with, we will by hand modify his appendix A.

THE COURT: I don't want it done by hand. If you are going to modify appendix A either based on what the plaintiff is now telling me or based upon what the defendant will tell me in a few minutes, I want it modified, I don't want anything oral. I don't want anything left to happenstance. I want a specific statement such as you now have in appendix A.

MR. ORLOW: That's fine, your Honor. We are happy to do that.

THE COURT: Listen to what the defendants have to say. You may want to give them what they want too. Let's see what they have to say.

MR. DORR: Your Honor, what we have to say is at several different levels and I need to begin with the issue of the relevance or lack of relevance of this information in its entirety. And it is important to begin at that point because what the plaintiff is attempting to do here is to pick out certain information which, in our view, is not relevant to begin with and attempt to utilize that information in a generic sanitized fashion without the defendants being able to get at underlying data within the trace database or underlying facts.

So the first place we begin with is whether any of the information sought by the plaintiffs is relevant in this litigation. And if I may point out, your Honor, the plaintiffs themselves concede that the Hamilton case governs the issue of the relevance of trace data in this litigation. And I would submit that in Hamilton, the New York Court of Appeals quite specifically rejected that notion that trace requests themselves can be notice of wrongdoing, and illegal or im-

proper conduct or create any affirmative duty on the part of manufacturers or distributors to police downstream dealers in the distribution.

And I would suggest the procedure, your Honor, established by way of having Special Master Dockery conduct an inquiry into the facts of the trace data system and the way in which that system is maintained and utilized by BATF reinforced and confirmed factual underpinnings for the holding of the Court in Hamilton.

In Hamilton, for example, the Court of Appeals noted that manufacturers are not told the purpose of a trace nor are they informed of the results of the trace. Special Master Dockery in his report, pages 10 and 11, confirmed that FFLs are only provided with the minimum information necessary for them to search their records and provide ATF with a response. FFLs are not provided with information about why the trace is being conducted, i.e., the crime code or who has requested the trace.

Therefore, the inquiry which your Honor initiated with the Special Master confirmed what the New York Court of Appeals had to say on that subject in Hamilton.

Furthermore, it establishes basically as ATF told the experts and Special Master Dockery that the information flows only one way. The manufacturers do not have and have not had access to this information, therefore, any use of the information that plaintiff seeks to have produced here to establish notice of wrongdoing would not do that because it's information heretofore, as counsel acknowledges, not available to the manufacturers.

Secondly, the report also confirms that with regard to the traces themselves, there is nothing contained in the database as was pointed out by the Court of Appeals in the Hamilton case which reflects the results of the trace in terms of whether there is any specific wrongdoing by any particular person in the chain, whether it be the first purchaser or the retail seller or anyone else in the chain.

Special Master Dockery noted at page 12 of his report that BATF does not follow-up on or maintain record on the progress of any investigations for which local law enforcement agencies request traces. There is no information in the BATF databases as to the suspects involved in such investigations, the outcome of those investigations or the role of the traces firearm in those investigations.

Therefore, the report confirms that you cannot establish through the trace database - - there is no field in the trace database that says retailer X did something wrong. As ATF itself says both in these proceedings, as I understand, and in published information, you can't look to the fact that a trace has been made or even that multiple traces have been made with respect to particular FFLs to infer or establish that anything wrong or incorrect has taken place.

That statement was not only provided in the proceedings to the Special Master but was provided most recently in a report issued by ATF in July of 2002 called "Crime Gun Trace Reports 2000" which stated specifically at page 63 of that report: The appearance of an FFL or first purchaser in association with a crime gun or in association with multiple crime guns does not show that either the FFL or first pur-

chaser has committed unlawful acts, rather, such information may provide a starting point for further and more detailed investigations which ATF says is the purpose they have for assisting law enforcement to help them conduct potential further law enforcement investigations.

The special master's report also confirms that not all traces are even provided to - - strike that. That the manufacturer or distributor is not even aware of all traces which are made, for example, out of business records which are maintained by ATF, are consulted by ATF prior to even going to a manufacturer. And if they make a hit within their database, that is, the retailer has been out of business, they never consult the manufacturer and, therefore, they never consult the distributor either. The same with theft. The same with so-called suspect guns. The same with multiple purchases.

A database which is maintained by ATF based upon reports that retailers provide to ATF whenever more than one handgun is sold to the same person by the same dealer within a five-business day period, those are reported to ATF, they put them in their database, they are electronically disseminated to agents around the country immediately. The multiple purchase records are consulted whenever a trace request comes in an if there is a hit, if they find out there has been a multiple purchase or a gun that has been traced was a result of a multiple purchase. The manufacturer is never consulted. They are never aware of the fact that such a gun has been traced.

So for that and a variety of other reasons as confirmed within Special Master Dockery's report, there is really no

foundation of reliability and foundation for making any kind of extrapolations from this data, both what it contains and doesn't contain, how it's contained. I think the report notes, for example, that the requesting agency is the one that fills out the various crime codes. That's subject to the discretion of the requesting agency. And there are a whole host of factors involved in the selection of crime codes which may mean the gun was not even used in connection with a crime, particularly when you consider that under comprehensive tracing, which ATF now has in some 50 cities throughout the country, as ATF says in the most recent report, "Crime Gun Trace Reports 2000," comprehensive crime gun tracing occurs when law enforcement authorities in a given jurisdiction routinely submit the serial number, manufacturer, model, caliber and weapon type of all firearms recovered in their jurisdiction to the National Tracing Center which may include firearms surrendered by a widow who no longer wants it in the house; pursuant to domestic proceedings even though it involved any issue between a wife and spouse or significant other, they are turned over to the police pursuant to either restraining orders or when they are called because of a domestic disturbance which may not involve a gun; homicides where a person could be stabbed in his home and have ten guns in his home, those guns are collected and would come under the homicide crime code, they would be traced even though they had nothing to do with the crime. So I think what the investigation which Magistrate Dockery did confirms the rationale.

THE COURT: Special Master.

MR. DORR: Pardon me, Special Master. Sorry, It confirms the bases and confirms the rationale of the holding of the New York Court of Appeals in Hamilton which said you simply can't utilized trace data as a basis for either notice or inferring wrongdoing on the part of someone in the tracing process simply based on the trace reports.

And I think that becomes important when you consider the fact plaintiff here is attempting to use that data to make precisely the kinds of inferences or precisely the kind of conclusions which both ATF and the New York Court of Appeals said are improper to draw. And therefore, it is the Defendant's position that the information which is sought is irrelevant to any issue to be decided in this case.

And when you balance that with what I understand ATF to still be asserting here and that is this data is protected and not discloseable because of law enforcement and privacy privileges, I believe ATF is still asserting that with regard to these materials, in the view of defendants' production in this case, even with the apparent agreement subject to - - a protective order between the plaintiff and ATF is inappropriate because that takes us to the next position which is that if you allow the production to the plaintiffs of the information which the plaintiffs are requesting here, that information is selective. It's selective in that they only seek certain information regarding disclosure of identities of certain FFLs and some additional information ignoring the other data that may be in the trace database.

And even though it's the position for defendants that the entire trace database is unusable for the purposes they want,

what the plaintiff wants to do is to select out certain sanitized information without reference to other information in the database that could be used by the defendants to challenge that information such as notes in the trace database about particular FFLs or about particular circumstances of a trace which may be explanatory, takes that trace out of the circumstances, the circumstances the plaintiff attempts to use it for or it can also be information such as the names of individuals who have purchased the firearms or from whom the firearms have been recovered and on down the line.

When the plaintiff says look at this information, it shows some sort of disproportionate traces from dealer X, therefore, the defendant should be liable. The defendants are entitled to challenge that they are entitled to investigate, to go underneath and beyond the facts of that, to determine whether, in fact, what they say is true or is it true that the ten traces that the dealer may have are all firearms that were recovered from someone who had been in the middle of a homicide and they were in his home, he purchased them perfectly legally. We are entitled to go into those facts.

The plaintiff by this agreement is trying to prevent the defendants from doing the underlying investigation, performing the analyses from the additional facts and items of information in the database which are necessary either within the database to challenge what plaintiff is saying or to enable the defendants to conduct the kind of investigation they need to conduct outside the database to challenge the plaintiff's inferences the plaintiffs are drawing from it.

We can going into more specifically the fields that the defendant has requested set out in our submissions but that is the basis for the request we are making, that we are entitled, if the plaintiff is going to be able to get some of this information, to get the rest of the information obviously providing the Court all the rulings on objections to relevance.

We don't think it's fair to use information which basically the New York Court of Appeals also has said cannot be the basis for asserting a duty or responsibility on the part of manufacturers without allowing the defendants to get at all the information.

MR. TENNEY: We approach this from a little different perspective although we agree with the defendants. We understand why the defendants are looking for the information they are looking for. We agree it's not relevant.

We understand now from the tracing system that the tracing system, in essence, is similar to the records a hospital might maintain and that is that when you ask for the introduction of hospital records, the first thing that happens is certain records are redacted although they are business records of the hospital, if the records in the hospital file are not admissible of themselves. Those records could not be put into evidence.

Well, when you start with the trace report that could be either electronically done on a fax and there is no affidavit from the person who is placing the original request from 14, 000 agencies, it starts with inadmissible hearsay and it's collected and used in various ways. So I would just suggest to the Court that that is a fundamental evidentiary problem

that arises with this material. And, of course, for the BATF's purposes it may be fine. The question is if those same materials are used for the purpose the plaintiff seeks.

But our main contention is, your Honor, that rule 1006 of the Federal Rules of Evidence or how we would contend, since this is such a substantial right, the best evidence rule in New York and we provided you the New York law in the case, which both provide that any summary materials and I don't think anyone concedes that the materials are going to be ending up in summary fashion, when any summary materials are admitted into evidence, the underlying materials all had to be admissible to begin with the part - - the adversary has to have reasonable meaningful opportunities to look and challenge all of the documents that make up the - -

THE COURT: I don't understand what you want to challenge.

Are you suggesting that they are not putting on their computers what is on the basic documents? Are they careless in converting the requests into computer documents?

MR. TENNEY: Your Honor, Special Master Dockery explained their center. One of their components is a system to correct errors so that acknowledges that errors exist.

THE COURT: Of course, errors exist in everything but is that the basis, that they are not copying this material correctly into their computer system?

MR. TENNEY: That's only one part of the challenge, your Honor. The fundamental challenge is that if the plaintiff is going to use the information for one inference, as Mr. Dorr

said, we should be able to go through the data to challenge the use of that summary information.

THE COURT: But I don't quite follow. I don't say you are wrong. I'm trying to analyze what it is you find objectionable.

MR. TENNEY: For instance, if the plaintiff comes out at trial with a chart that says based on summary fashion that the BATF gave, there is going to be a summary on top of a summary probably that a certain amount of handguns were sold from A manufacturer to B distributor to C dealer that ended up in a crime situation, we should be able - -

THE COURT: Let's just take A to B to C. You are not contesting that part, are you?

MR. TENNEY: Certainly we should have the right to examine.

THE COURT: Why do you need to examine?

MR. TENNEY: Isn't a matter of us explaining to the Court why we have a right - - why we have to look at the data. Under Rule 1006, the judge does not have discretion to waive the requirement that originals or duplicates of voluminous writings, recordings or photographs be made available for examination of copying at a reasonable time or place. And the reason we are making that request on evidence, the reason why Professor Berger or Professor Farrow or you would be saying that they agree in 1006, it's a very short section compared to relevance, is because it's written into the rules of evidence to protect any possible prejudice there might be.

It is the party who seeks to put a summary document in evidence, it is their burden to provide us with that judge. There have been several statements. You would know Judge Frank Coffin in the First Circuit who wrote and opinion, 94 F3d 1, in 1996 and he just went through it in a case that describes - - referred to your book and he said that there was just no way that you can end run the need to have available evidence for the party who is adverse for the party that is - -

THE COURT: I understand that.

MR. TENNEY: What I need it for, how am I going to know?

THE COURT: I'm just asking you to tell me whether you want it in order to check the accuracy of their copying or you want it for some other reason.

MR. TENNEY: That could be. Remember, we are starting out with a system that according to Special Master Dockery, who did a wonderful job, according to his report with 1.5 traces were started and about 50 percent of them were completed. Well, your Honor, there were various reasons for that but we should be able to challenge and look at beyond it and see if there were inaccuracies in the process.

The second reason though is that it would be unfair and violative of our rights to not look at everything that the BATF has so we can determine whether certain fields in combination would help us to support a challenge to the evidence offered. It's as if, your Honor, there was an apartment house with multiple windows and lights in certain windows were on and these are the fields they have given us but there

are other lights that are not on and until you open the switch and you see there is one of the lights that wasn't given before is significant to one of the lights that was on, then you found something.

THE COURT: That, I understand. The relevancy problem and the probative force problem.

MR. TENNEY: Yes, your Honor. But we started out with a plaintiff that's looking for information that the New York Court of Appeals has said is irrelevant. So we start out with that and we are trying to challenge that and you are asking us for relevance. It sort of puts us in a position of having to subscribe to the counterintuitive statements that plaintiff has put forward.

THE COURT: Just to get back to Rule 1006. I don't understand that they are giving you summaries at all.

MR. TENNEY: Sorry, your Honor.

THE COURT: I don't understand that they are giving you summaries. They are giving you the numbers directly. The summary is going to be by the expert.

MR. TENNEY: No. What I understand is the BATF is only summarizing certain data.

THE COURT: No, they are giving you the data.

MR. TENNEY: They are not giving us all of the data.

THE COURT: What you want, as I understand it - - I'm trying to follow the argument - - is the additional data they are not giving you. You would like to look, I take it, at the

requests from the police and others from which they make their computer records.

MR. TENNEY: That's correct, your Honor.

THE COURT: But that's difference from a summary.

MR. TENNEY: No, your Honor. Your Honor, as I understand it, the BATF was going to summarize certain databases and give coded information about certain matters and that the plaintiff was going to rely on that information.

THE COURT: That's not my understanding. They are going to give you the data and the experts are then going to analyze that data and make summaries from that. But you are going to have the same data the experts will have.

MR. TENNEY: Your Honor, with due respect, they aren't giving us all the data, I guess that's what you were getting to. They aren't giving us all the data. They are giving us certain data fields.

THE COURT: It's not a summary problem. I'm trying to find out what it is that bothers you.

MR. TENNEY: What bothers us - -

THE COURT: It's not a summary problem under Rule 1006, if I'm following your argument. I'm no longer an expert in this field, I'm just a judge. I don't see how Rule 1006 is the basis of the objection you are making.

MR. TENNEY: Your Honor, it is that plaintiff ultimately will be making summary statements from less than the entire data base.

THE COURT: That, I understand. They are selecting some of the basic data they say supports their conclusion.

MR. TENNEY: And plaintiff is going to make a summary of selected data.

THE COURT: That's right. But you will have the same data they have so it's not a Rule 1006 violation, if I understand your argument.

MR. TENNEY: Your Honor, the problem is the plaintiff has acquiesced to taking only three slices out of the loaf. And from the three slices that she has selectively taken, she wants to make the arguments that she makes.

We believe that the entire loaf - - it's ultimately a summary of what she is doing because the entire loaf was not exposed.

THE COURT: I understand. But why do you need the rest of the loaf?

MR. TENNEY: We cannot know that until we see it, your Honor.

THE COURT: I know. But you must have something more precise in mind.

MR. TENNEY: Mr. Dorr has given us several examples of the kind of things that are precise. I understand from one of the depositions that if someone legally purchases a handgun and is a pillar of the community and shoots himself, it happened that's a crime gun, he has ten other guns in the house, those ten guns become crime guns.

THE COURT: Those are all problems that you can raise in contesting the probative force of what their experts are coming up with.

MR. TENNEY: No. their expert will get on the stand and say I have looked at the three slices of the bread and I don't have any other information except - -

THE COURT: On cross-examination, you will ask what you are suggesting now. You are going to say that this doesn't tell us what we need because there are all these other things that could happened, right, and he will have to say that you may be right. I haven't looked at the other slices of bread.

MR. TENNEY: But we haven't gotten the underlying data. He has selected certain fields which become - -

THE COURT: It's what the BATF is going to give. I'm not going to force the BATF to give them what the plaintiffs want. I'm saying to the BATF if you can within the ambit of your responsibilities to the federal and state and other governments give up this information under the strict secrecy arrangement, will you do it, and they said yes... If you have something in addition you want, have you asked them for it?

MR. TENNEY: We said we will agree to everything the defendants have asked for and the BATF hasn't acknowledged certain fields as potentially obtainable by the defendants. We would like to see that but we go further. We say that you cannot allow this, what will ultimately be summaries of summaries to be produced in court without all of the data underlying it.

THE COURT: As I understand your position, it's this: You want to see everything in the BATF computers, I am telling you I'm not going to give it to you.

MR. TENNEY: I understand, your Honor.

THE COURT: Now, if you have something specific you need, you want in one of the fields, ask the BATF for it and I will tell you whether, if they refuse it, you can get it. But I'm not going to take an all or nothing argument, "you have got to give us everything or we are not going to even consider going forward with this."

MR. TENNEY: Your Honor, I respect your ruling.

THE COURT: I'm telling you that I expected you and still expect you to ask the BATF for fields which they are not giving to the plaintiff. If you do ask them, they may give them to you. If you don't, they are not going to give them to you.

If you ask for everything in the BATF computers, you are not going to get it because you haven't justified it to me. And the justification we have to see the whole loaf before we can examine three slices doesn't cut it.

I'm trying to be helpful to the parties. That's why I appointed Dockery. He has been helpful.

I want to know what else the defendants want that isn't on appendix A.

MR. DORR: We have asked for certain fields, your Honor, which ATF has. As I read appendix A, some of those

ATF has now agreed to provide in their entirety as I understand it but I need to confirm with them.

THE COURT: Confirm it with them. Is it your expert looking at it? What is it that you want and that you can justify explicitly that they haven't given you?

MR. DORR: Which they denied? In table number 1, FTS administrative, there are no fields explained to us. There are notes submitted to them submitting by the submitting law enforcement agency which submits the trace.

THE COURT: I will not give you that.

MR. DORR: Why not, your Honor?

THE COURT: I don't want you getting involved in those kinds of investigations at that detailed level.

MR. DORR: We were informed the New York City Police Department is an agency which uses that field more than other agencies. Your Honor has indicated that this case may devolve being a New York-based case. That field may explain - -may contain notes which explain the reason the trace was made.

THE COURT: I have BTF here. Do you want to give them those notes?

MR. ORLOW: No, we do not, your Honor.

THE COURT: I'm not going to go behind the computer and go into those notes by police and other people.

MR. ORLOW: A couple of points. Our attachment A is what we are willing to give the defendants as to what we have understood they asked for. There is an indication on the attachment as to X indicates that's what they asked for. You will note a whole series of Ys, we are giving what they asked for.

The note fields are not on that. For the record, it's not currently before the court. I would be happy to give you a copy of what Commissioner Ray Kelly wrote to the Attorney General to implore him to keep appealing the Chicago FOIA case. We have NYPD very much on our side in that.

MR. DORR: Table 17, your Honor, contains investigative notes of suspect FFLs. Those notes are provided. It's called do not contact list.

THE COURT: I will not give you that either. Those are investigations I don't want you to get involved in. I will not force them to give them to you.

MR. DORR: The notes may be explanatory of whether an FFL was investigated and/or was cooperating in an investigation if the plaintiff says a particular FFL.

THE COURT: Excuse me. That is clearly what I'm not going to give you. I think the BATF is right in not wanting to give up that kind of information. I have not been convinced that it's going to affect you experts in the least in their analysis.

MR.DORR: Table 21 there are notes regarding thefts which would be explanatory of FFL thefts.

THE COURT: No, I will not give you notes.

MR.DORR: In table number 9, there are notes regarding dealer traces that may reflect specifically on traces involving particular dealers one way or another, exonerating them or indicating that ATF is on top of those dealers which would be relevant to the Defendant's defense.

THE COURT: I will not give you that. That involves revealing investigations underway. You are clearly not entitled to that, in my opinion. I don't see how it's going to inhibit you or your experts in cross-examining and in devastation of the experts for the plaintiffs.

MR. DORR: I agree they can be devastated. Based upon this, we have a right to defend ourselves in terms of inferences they intend to draw with regard to particular dealers having disproportionate traces. If these notes reflect a dealer, for example, made a sale of 50 guns to a particular person at the request of ATF so they can get the bad guys, we would be entitled to demonstrate that. And we are going to be hog tied in our ability to defend ourselves if the plaintiff is given some of this data, allowed to draw improper inferences and we are not able to determine whether there is underlying factual information which can challenge the claim they are making or assist us.

THE COURT: With respect to this last hypothetical, if one of the dealers issued such a request to BATF, the dealers are defendants here, I will give you that.

MR. DORR: No retail dealers are defendants in this case.

THE COURT: Distributors?

MR. DORR: There are distributors.

THE COURT: You are talking about retail dealers?

MR. DORR: Yes

THE COURT: I withdraw that.

MR. DORR: Is your ruling the same or will you permit that?

THE COURT: I will not permit it. It involves ongoing investigation.

MR. DORR: Your Honor, as I read the submissions of ATF and Magistrate Dockery's report, the tables which the plaintiff is obtaining also involved potential ongoing investigations.

THE COURT: Potential, potential but not notes.

MR. DORR: The notes may indicate there is no investigation when the plaintiff says that there is a basis for there being an investigation. Each of the individual FFL - -

THE COURT: What's the BATF's response?

MR. ORLOW: If I may, the plaintiff's request are not tied in any way to a specific trace, generic trace information in the fields they are requesting. Our thing all along, as far as law enforcement sensitivity, is to prevent the link, to allow somebody to determine all the pieces we consider to be the key, the final retail dealers, the law enforcement agency, the investigation underlies the trace and the defendant - - plaintiff's data doesn't do that.

MR. DORR: It's my understanding that in order to be able to conduct a trace, there must be bona fide law enforcement basis for conducting the trace. And it's been ATF's position that given the fact that there may be ongoing law enforcement investigations either of the retailer dealer, the first purchaser of the firearm or someone who obtained the firearm later on and since ATF is not in a position to know whether that ongoing investigation is continuing, I don't think ATF could be in a position of waiving the rights in order for this to be consistent of other law enforcement agencies that may have ongoing investigations regarding the information the plaintiff requested.

ATF is taking the position here they don't want to disclose ongoing investigations by other agencies. It's my clear understanding that it's been ATF's position because they don't know whether those investigations are ongoing within a particular law enforcement agency that they are unwilling generally to disclose this information including which the plaintiff is requesting.

THE COURT: Allow the defendant to speak without interruption please.

MR. DORR: Item number 29, this is the field where the names are individuals associated with traces, gives a name and address of a particular individual.

THE COURT: What's the BATF position on that.

MR. ORLOW: Our position on that is that we do not want to give that out, that's the name and address.

THE COURT: I'm not going to compel them to do that.

MR. DORR: Defendants would like that in order to be able to determine whether we can from the database itself or further investigation whether the purchase is a legitimate lawful purchase or not. The plaintiff will be implying it wasn't.

THE COURT: Your cross-examination, your arguments to the jury on those issues is uninhibited. It's obvious that the argument you are now making will have or may well have a devastating impact on the position the plaintiffs are trying to establish, but I'm not going to order the BATF to give up these names.

MR. DORR: Table number 30 contains notes regarding those individuals, again, the notes.

THE COURT: Same. I will not give you notes or not force them to give you notes.

MR. DORR: Table number 34 contains information - - sorry, 32 and 33 contain information regarding thefts.

MR. ORLOW: Same rationale, your Honor. We don't want to disclose that for law enforcement reasons.

MR. DORR: There is a prior theft table as well. Is the ruling the same?

THE COURT: Denied.

MR. DORR: Table number 34 contains information regarding invalid FFLs. It's my understanding of the plaintiff's recent request, they want some of this too. I don't know what's been worked out with the ATF. We would want

the information sufficient to actually disclose the identity of the invalid FFL.

MR. ORLOW: In plaintiff's proposed order on page 2 at the bottom, she addresses invalid FFLs which are basically organizations that don't have to follow the federal laws as relates to purchase of firearms. They are given a number. To the extent involved in dealing with firearms and possibly for enforcement purposes, plaintiff agreed to accept an indication simply denoting whether that particular licensee what was we consider to be an invalid dealer, somebody such as a military entity or another law enforcement entity, things like that, so you will be able to tell where one was but not who it was or why or anything.

THE COURT: Will that satisfy you?

MR. DORR: It will not. We believe we are entitled to the identity of invalid FFLs plaintiff is drawing inferences from.

THE COURT: I will not force the BATF to give it to you.

MR. DORR: Table 35 has invalid FFL notes, notes in the trace database regarding those invalid FFLs.

THE COURT: I'm not giving you notes, not compelling BATF.

MR. DORR: Table 43 gives recovery information the plaintiff - -sorry. ATF will not provide the exact address at which a recovery of a firearm was obtained. We would like that address form means of challenging the use to which the plaintiff may put this information.

MR. ORLOW: We agreed to provide the zip code and county but for law enforcement privacy concerns, we continue to object.

THE COURT: Zip code, that seems to me sufficient.

MR. DORR: We want the address to conduct - -

THE COURT: Denied. I will not force BATF to give you identities.

MR. DORR: Table 44 has notes regarding recovery location.

THE COURT: You are not going to get notes from BATF unless they want to give them.

MR. DORR: Table 49 is a list of suspected persons, those are suspects that ATF maintains in its database. What is included in that list and what is not included may be of relevance and use in both challenging what the plaintiff puts to this database and conducting further investigation for an offense.

MR. ORLOW: Same rationale, willing to provide some general detail but nothing that identifies them specifically.

THE COURT: That's sufficient.

MR. DORR: Table 50 contains notes regarding suspected persons which may tell us, for example, that a dealer the plaintiff claims is someone suspicious was a dealer who informed on that suspect in person and, therefore, is exonerated from the kinds of conclusions plaintiff seeks to draw.

THE COURT: Denied. That's the kind of investigative material nobody should get.

MR. DORR: Table 52 is slightly different, contains remarks regarding various laws, regulations of other states we think.

THE COURT: Remarks by whom?

MR. DORR: Laws by other states or - -

THE COURT: What remarks? What do you mean by remarks?

MR. DORR: I would have to ask ATF that. It's remarks they have put in with regard to those laws. I assume it would indicate whether, for example, another state has a procedure by which firearms may be traced or a procedure by which FFLs may be regulated, whether properly compliant with the laws.

MR. ORLOW: That field, your Honor, relates to states that have their own independent regimes as far as conducting background checks and things like that. There is reference to point of contact people in states. We are willing to give certain of the information that was requested but remarks again in the note field, as I understand, they could have some sensitive, potentially sensitive information.

THE COURT: You can give them only what you have just indicated you will give them.

MR. DORR: Table number 57, theft recovery, ATF is not willing to give information as to the name or address of the person from whom the firearm was recovered nor are they

willing to give the name of the agency, the ORI agency which originated the question. We would like that for purposes of conducting further investigation.

THE COURT: Denied. This kind of information would be destructive of the whole system of criminal investigations.

MR. DORR: Table number 58, theft recovery notes. Again, these are notes regarding theft recovery.

THE COURT: Denied for the reasons already indicated.

MR. DORR: Number 59, FTS trace of - -this is the trace table. Again, we are interested in the originating agency's name and the name of the person so we may conduct possible and further investigation. And we also want additional identification information so we can either utilize the information or demonstrate the conclusions plaintiffs are drawing are incorrect or further investigation to defend ourselves.

THE COURT: Denied. I will not give you that kind of detailed information with names.

MR. DORR: Table 60 and 61 deals with trace indicator codes which provide certain indicators within the database. We request that those codes be provided for both table 60 and 61.

THE COURT: I'm not sure I understand what this is. What is this?

MR. ORLOW: As I understand that field, this is a relatively new field.

THE COURT: While you are conferring, how much longer will you be? We can break for lunch or go on.

MR. DORR: Just about finished with the FTS tables. There are federal licensing tables we have requests in as well. If I can finish with these tables, if the Court will permit us to submit what we have already submitted subject to obviously the same argument we would make, I assume your ruling would be the same?

THE COURT: They would be.

MR. ORLOW: Sorry, your Honor. On the trace indicator reference codes, those are relatively new codes and as I understand it, those are codes that allow you to connect to a specific event such as the Pentagon bombing by the terrorists.

THE COURT: Denied.

MR. DORR: Table 62 is trace notes. Again, these are notes regarding traces. -

THE COURT: Denied.

MR. DORR: And table 67, weapon notes. Notes regarding particular firearms.

THE COURT: What's the view of BATF?

MR. ORLOW: It's a note that could contain investigative--field investigation.

THE COURT: Denied.

MR. DORR: Those are the requests from the FTS system. And again, with the Court's permission, as you indicated from the federal licensing system, we have requests but I understand your rulings would be the same?

THE COURT: They would be on these items.

Now, what I want to happen is this. I want the plaintiffs' proposed changes to the ATF-- what it wants in attachment A. I want the defendants to do the same thing. I want the BATF to consider these requests from both sides seriously, as you have. And I'm very grateful to everybody, defendants, plaintiffs, the experts, for everyone and the BATF. I think everybody has engaged in a bona fide attempt to get information that every side wishes and thinks they are entitled to.

I want you to do that forthwith, in 48 hours, if you can. I would like you to give me any amendment to your proposed order which seems to me in general to be in good shape with respect to secrecy and any change in your attachment A on the basis of what has been said.

THE COURT: Does you appendix A deal with FLS at all?

MR. ORLOW: Yes.

MR. DORR: I don't think it does.

THE COURT: We don't have it in our copy.

MR. ORLOW: I apologize. I don't have a complete copy. There are approximately five fields.

THE COURT: Would you correct that by putting those in. Put in whatever else you can put in they want that you have refused up to this point, and within 48 hours I want you to give me the new attachment.

As far as the secrecy order itself, it's rather complete and very strong. I think that BATF and the government are entitled to that kind of a strong secrecy agreement.

Does the plaintiff have objection to that part of the order?

MS. BARNES: Your Honor, I think it creates a bureaucratic nightmare for the plaintiff and for the management of this and I would simply propose that the responsibility be put upon the shoulders of the parties to maintain the secrecy, to submit to ATF in any form that they need.

THE COURT: Denied. I'm not going to give you that freedom.

What's the defendant's view?

MR. DORR: Your Honor, we do have objections to the order. We do believe it inhibits our ability to conduct the necessary investigations to the appropriate people. We would be happy to have anyone who might conduct an investigation to assist in our defense sign a protective order, be subject to it. This order limits counsel and expert witnesses. We think it should be broader for purposes of assisting us in our defense.

THE COURT: You have the option, as I recall, in the proposal to have others added.

MR. DORR: I think only if they are included within the category of accepted persons.

THE COURT: If you have somebody else, make an application. As it stands, I'm going to follow the BATF suggestion, at least initially.

The reality of our situation is this and I don't say this critically of counsel, I think in this, as in other cases, we have been blessed with very competent, highly professional counsel doing a job decently, as they see it, for their clients. We have to recognize what we are doing in this case is for the first time really, as far as I can tell, attempting to look into these databases to see whether they can be helpful. We want to do it in a way that doesn't in the least jeopardize any current or future criminal investigations. That's particularly important in the light of the investigations that are ongoing with respect to terrorism and the like.

Given the fact that the BATF has this obligation towards the public, law enforcement agencies, licensees, manufacturers, distributors and others, it seems to me that they have been forthcoming. They have cooperated to the extent possible. I compliment BATF for this. I understand the severe political and other restraints they are under. We all have to understand that. We are all knowledgeable of the facts with respect to crimes, terrorism and guns.

My intention is, as I said, to sign the proposed order. Any nuances the parties want to work out in the next day or two, fine. As to the appendix, the attachment I think you called it, that needs some tweaking because it's left out some stuff and

some other things need explication. That's my intention and that's what I'm going to do.

So I suggest that the experts and counsel get together with the BATF and get this appendix straightened out because that's going to be the appendix.

I'm not going to certify this. You can take it up on mandamus.

I would like to get the order in as quickly as possible. If you want to take it up on mandamus, you are free to do so forthwith because we have a November 17 trial date. I'm going forward so I want to sign something this week.

MR. DORR: May I, your Honor? We have some additional concerns about the protective order. Rather than delaying this proceeding, can we just try to work it out and we will submit something in writing?

THE COURT: Or you can see me. I will be here all week. I will work it out. I think in general BATF has been reasonable. I understand it's complex, and it's going to make it more difficult, but I think BATF has been reasonable.

MR. JOYCE: I couldn't help note your comment you were going forward. I know you have the decision on the standing motion under reservation. Is there an estimated time of arrival for that decision?

THE COURT: Yes. I will issue a preliminary decision this week denying the motion. I will issue a longer memorandum when and if I can get to it. I have a lot of other cases. I don't think it's fair to hold up the decision, so I will

get out a decision. You can do what you want on mandamus or appeal.

I will try to put it in terms of an order so you know where you stand. Then later on, because it will take me a little while, I will get out the rationale which I have in my head but I don't have on paper.

MR. JOYCE: I take it your Honor has denied the motion to certify?

THE COURT: I'm denying the motion to certify; correct.

MR. GROSS: Your Honor has indicated that you are preliminarily denying all motions including jurisdiction and standing.

THE COURT: Jurisdiction and standing, correct, not preliminarily, I deny them. I will issue a preliminary order to then be supplemented as soon as I can get to it with a more extensive explication of the reasons. I wanted you to know where you stood.

MR. GROSS: We know where we stand.

THE COURT: Was that for the record or was that sotto voce?

MR. GROSS: We do understand where we stand.

MS. BARNES: An across-the-board issue with respect to the database, FLS and FTS Exhibit 8 doesn't indicate the time through which the data will be given.

THE COURT: What time are you giving?

MS. BARNESS: We ask through December 1, 2001.

THE COURT: What are you giving?

MR. LIPARI: Discover cutoff in this case goes through November 2000, as I know. We are not sure why they want to extend the period.

THE COURT: If that's what you have, we will give it to you. 2000, November 2000.

MS. BARNES: Your Honor, may we have through the end of the year? The trace database lags behind obviously production data so what we are getting is sales data through--

THE COURT: Can you give them to the end of the year?

MR. ORLOW: Through calendar year 2000?

THE COURT: Correct.

MR. ORLOW: Yes, your Honor.

THE COURT: All right.

MS. BARNES: As the Court may know, the issue of when a gun is sold - -

THE COURT: That's what you are getting, December 31.

MR. RENZULLI: Your Honor, you mentioned a jury in one of your comments. Is that an advisory jury or jury at law?

THE COURT: You better brief it. My understanding is that since this is an injunction, you are not entitled to a jury

at law. Whether you are entitled to an advisory jury seems to me to be doubtful. However, in view of the fact that it is a matter of substantial public importance, I'm now considering an advisory jury.

The decision will be made, as I understand it, by the Court without a jury since it's not a legal issue, but I will be advised by the jury and consider its advice. If we use such a jury, as I think I'm now prepared to do, we will have a questionnaire for the jury and I will draw a panel of 100.

I suggest you brief it. The jury will be asked whether it finds liability and it will be asked what form of relief if any should be available. That requires a considerable amount of briefing on your part, I believe.

If you want some other method, if you want the Court to do it without a jury or if you think you are entitled to a jury, you better brief it. I'm giving considerable thought to that problem. Your help would be much appreciated.

MR. RENZULLI: Any other trial details, your Honor, you thought about that you might share with us?

THE COURT: I want you to exchange your experts' reports. You can't do that until you get the data. Follow Rule 26 but I want them exchanged as quickly as possible. The magistrate will help you with that because you are going to want to take their depositions.

I want you to exchange any placards, exhibits, charts as soon as possible because, obviously, you will have to use some visual aids since the various computer numbers are almost impossible for laymen to understand. There will be

presentation problems. I would like to have them exchanged.

I would like you to exchange all of your exhibit lists so that you know where you are. I want it done as quickly as possible so that we can proceed in a reasonable way.

I will be available to meet your pretrial, to help you. There will be some in limine rulings you will want I'm sure. I will be happy to give them to you to the extent that I can. Some of it will require briefing.

MR. TOBIAS: I know it's not your usual practice but perhaps in this case a pretrial order would be warranted.

THE COURT: Well, if you want to submit a pretrial order. Do you have my boilerplate pretrial order? Get it from Ms. Lowe. If you want to come forward with a pretrial order by stipulation or individually, I would be happy to hear it and have it. We will need briefs.

If we are going to give it to an advisory jury, I will charge which should be here a few days before we select. As I say, I want to proceed to select a jury by questionnaire. I can have Ms. Lowe, if you want to ask, get a couple of questionnaires I have used in other cases. I think I had a questionnaire for Agent Orange, a civil case, and in a number of criminal cases. They will give you an idea of what I think would be a good way to start.

MR. TOBIAS: Thank you.

THE COURT: Anything I can do to help, I will be happy to do.

Anything further?

MR. RENZULLI: Your Honor, will you hold any 104 hearings, experts?

THE COURT: You mean a Daubert hearing? Sure, if you want one. You have to ask for it.

Anybody else? Any questions?

MR. DORR: Your Honor, under the order set up by Magistrate Pollack, plaintiff's experts' reports were due today. I understand from what you have said that perhaps with regard to ATF, it will be difficult to get those reports. Certainly any experts that do not deal in trace data, we ought to have them by the end of the day today.

MS. BARNES: All of plaintiffs' experts one way or the other are resting on this data.

THE COURT: When will the BATF be able, assuming I sign the order this week, today is Monday, by let's say Thursday morning, when can you give them the data they need?

MR. ORLOW: I understand from our tracing center person it will take several days. If it's not unreasonable to ask until next Friday.

THE COURT: Not this week?

MR. ORLOW: Your Honor, if the order is entered Thursday, they said they need several days. Once we are sure what the universe - -

THE COURT: I will tell you what the order will be. Look at your attachment A, that's what the order will require.

Try to give it to them next Wednesday, if you can.

MR. ORLOW: Okay.

THE COURT: So everybody will have it next Wednesday.

What will your experts for the plaintiff require?

MS. BARNES: They will require, your Honor, at least three weeks, if not four.

THE COURT: Go back to the Magistrate Judge on that. You are not going to get four. I can't say. I don't know what it takes. We have to be reasonable about what the experts can do. If necessary, I will have to adjourn the case although I hate to do it. I have a very heavy calendar. I have other cases.

MS. BARNES: Your Honor, just to be clear, the ATF, as I understand, is agreeing to produce one database both to plaintiff and to defendants just on the technical matter, they are not going to produce certain things only to defendant, one unified production?

THE COURT: Everything you get, they get. Everything they get, you get.

MS. BARNES: Thank you.

THE COURT: Anything further?

MR. GROSS: If your Honor determines that an advisory jury is the appropriate way to try this case, will you accept input from the parties as to the questionnaires?

THE COURT: Of course.

MR. GROSS: In your normal fashion?

THE COURT: Of course. That's the way it works. You get a copy of the questionnaire, I go over it with you for you to make suggestions. But I suggest that you might want to look at some of the others I have done already. Ms. Lowe has that and it will help you get along. Certainly.

Anything I can do to help you, I will. I suppose anything you can do to help me, you will do.

MR. TENNEY: Your Honor, along those lines, Judge Pollak's discovery order had a provision for summary judgment motion.

THE COURT: You can make a motion for summary judgment any time you want. I'm here all the time.

MR. TENNEY: I wanted to make sure.

THE COURT: Any motion you want to make I will hear at any time you want me to hear it.

Again, I want to thank all you distinguished counsel for coming in and giving me advice and help.

(Whereupon, the matter was concluded.)

APPENDIX F – AFFIDAVIT OF HAROLD LITWIN, CHIEF OF OPERATIONS, BUFFALO POLICE DEPARTMENT, DATED JULY 3, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action
No. CV-99-3999

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

-against-

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Civil Action
No. CV-99-7037

Plaintiffs,

-against-

(Weinstein, J.)
(Pollack, M.J.)

ACUSPORT CORP., et al.

Defendants.

Harold Litwin, as his declaration, pursuant to 28 U.S.C.§ 1746, states:

1. I am the chief of Operations for the City of Buffalo Police Department. In this position, my responsibilities include overseeing the City of Buffalo Police Department's Detective Division. I have been with the City of Buffalo Police Department for 34 years. I have supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the City of Buffalo Police Department in these investigations is the tracing of firearms by the Bureau of Alcohol, Tobacco and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. I submit this declaration to oppose plaintiffs' motion to compel the Bureau of Alcohol, Tobacco and Firearms (ATF) to respond to a Rule 45 subpoena for documents and information from it's Firearms Tracing System (FTS). ATF provides firearms tracing services in support of criminal investigations to our Department, Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently makes available provides the general

public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If ATF were to fully disclose the firearms tracing information sought by subpoena in this case criminals, who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosure are too grave to rely on safeguards currently in place, such as "do not contact" codes, to protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harms at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could easily see what guns were recently

traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to deduce firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to

link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their modus operandi if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace requests that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation is working an investigation with another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data

disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 3rd day of July 2002.

APPENDIX G – CONSENT TO FILE PER SUPREME CT. R. 37, DATED SEPTEMBER 26, 2002

Law Offices

Crabbe, Brown & James, LLP

500 South Front Street
Suite 1200
Columbus, Ohio 43215

Telephone: 614.228.5511
Fax: 614.229.4559

Email: Lcomek@cbjlawyers.com
www.CBJLawyers.com

WRITERS DIRECT DIAL NUMBER
229.4557

December 9, 2002

Via Regular Mail
Maria S. Georges, Esq.
Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602

Via Regular Mail
Benna Ruth Solomon, Esq.
Chief Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602

Via Facsimile and Regular U.S. Mail
ATTN: David A. Graver
Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800

Chicago, IL 60602

Re: U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. City of Chicago
Our File No. 10093-29014

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation on Friday, December 6, 2002 with regard to the above captioned litigation. Pursuant to that discussion, and in accordance with Supreme Court rules, the City of Chicago has consented to the filing of an *amicus curiae* brief, on the merits, by the National Fraternal Order of Police.

If you have any questions, please do not hesitate to contact me. As you know, I can be reached at (614) 229-4557. Otherwise, this correspondence will serve as sufficient acknowledgment of said consent.

Very truly yours,
CRABBE, BROWN & JAMES, LLP

Laura MacGregor Comek

LMC/tlm

cc: Larry H. James, Esq.